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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No. 378

HARLEY BLAYLOCK AND MARION L. BLAYLOCK,
Petitioners.

vs.

THE STATE HIGHWAY COMMISSION OF THE STATE OF KANSAS.
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS.

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INDEX

Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	2
Statement	3
Reasons for Granting the Writ	6
Argument	7
Conclusion	10
Appendix	A1
Highway Entrance Permit	A1
Opinion of the District Court of Johnson County, Kansas	A5
Opinion of the Supreme Court of Kansas	A10

Citations

Cases—

Brewer v. *Schammerhorn*, 183 Kan. 739, 332 P.2d 526	9
Creasy v. *Stevens*, 160 F. Supp. 404	7
Donovan v. *Pennsylvania Co.*, 199 U.S. 279, 50 L. Ed. 192, 26 S. Ct. 91	7
Durand v. *Higgins*, 67 Kan. 110, 72 Pac. 567	9
First Nat. Bank of Lawrence v. *Methodist Home*, 181 Kan. 100, 309 P.2d 389	9
Hagan v. *Scottish Union and Nat. Ins. Co.*, 186 U.S. 423, 46 L. Ed. 1229, 22 S. Ct. Rep. 862	8
Kennedy v. *Monroe*, 165 Kan. 168, 193 P.2d 220	8
Kinmouth v. *Griffith*, 180 Kan. 389, 304 P.2d 494	9

Martin v. *Creasy*, 360 U.S. 219, 3 L. Ed. 2d 1186, 79 S. Ct. 1034 6

Riddle v. *S.H.C.*, 184 Kan. 603, 339 P.2d 301 7

Rose v. *Board of Directors of School District*, 162 Kan. 720, 179 P.2d 181 9

Constitutional Provision and Statutes—

United States Constitution, Amendments V and XIV 2, 3, 7

28 U.S.C., Section 1257 2

Kansas G.S., 1961 Supp., 68-1901 5

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS.

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Kansas entered in the above case on April 6, 1963.

OPINIONS BELOW.

The original opinion of the District Court of Johnson County, Kansas, filed December 20, 1961, is unreported and is set out in the appendix hereto, *infra*, p. A5. The opinion of the Supreme Court of Kansas, filed April 6, 1963, is reported at 191 Kan. 187, 380 P.2d 337, and is set out in

the appendix hereto, *infra*, p. A10. A timely motion for rehearing was filed but was denied without opinion by the Kansas Supreme Court on May 17, 1963.

JURISDICTION.

The judgment of the Supreme Court of Kansas was entered on April 6, 1963. Rehearing was denied on May 17, 1963. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257, since the state court has sanctioned the taking of petitioners' property without due process of law or compensation in violation of the Fourteenth and Fifth Amendments to the Constitution of the United States.

QUESTIONS PRESENTED.

Whether the State of Kansas acting through its State Highway Commission is liable for the confiscation and taking of petitioners' rights of access, that is, whether access to a highway is a property right compensable under the Fifth Amendment and made applicable to the States through the Fourteenth.

Whether a State can evade the due process clause by a unique construction of relevant documents having no basis in the prior law of the State or to settled legal principles and so completely contrary to the law of all jurisdictions as to appear unreasonable.

CONSTITUTIONAL PROVISIONS INVOLVED.

"No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U. S. Const., Amend. V.

"* * * nor shall any State depriye any person of life, liberty or property, without due process of law;" U. S. Const., Amend. XIV.

STATEMENT.

Petitioners are the lessees of a truck stop restaurant facility located about one-half mile north of Olathe, Kansas, on Interstate Highway 35. On April 7, 1959, the State Highway Commission destroyed and eradicated the driveways connecting petitioners' restaurant to the main highway. On November 3, 1959, the petitioners filed suit against the State Highway Commission in the District Court of Shawnee County, Kansas, alleging in their petition:

> "That no notice of defendant's action was given to plaintiffs and no proceedings in eminent domain were had. That since April 7, 1959, plaintiffs have made repeated demands for the defendant to re-establish plaintiffs' driveways and right of direct access as hereinabove described, but defendant has refused and continues to refuse to allow plaintiffs to re-establish said drives and permanent right of direct access."
>
> "That defendant has neglected and refused to condemn plaintiffs' interest under its powers of eminent domain and its taking or interference with plaintiffs' right of access constitutes a taking of the valuable property and property rights of these plaintiffs without due process of law for which taking these plaintiffs are entitled to be compensated."

The action was premised on an implied contract to pay for the property taken. It was evident at all stages of the proceedings that petitioners were claiming a flagrant violation of their constitutional rights. In petitioners' Mem-

orandum Brief to Defendant's Demurrer submitted to the trial court it was urged:

> "There is no question but that the defendant, State Highway Commission, is subject to legal restraint when it attempts to acquire property rights without compensation in violation of the Fourteenth Amendment to the Constitution of the United States."

In the opening paragraph of petitioners' brief to the Kansas Supreme Court having to do with the Nature of the Case we find the following:

> "This is another implied contract case where the State Highway Commission has once again attempted to confiscate access rights without condemnation."

The respondent, prior to cutting petitioners' access, had full knowledge of petitioners' rights and claims. In utter disregard of those rights the State Highway Commission simply bulldozed out the entrances and confronted petitioners with an accomplished fact. The State of Kansas adheres to a legal fiction which implies a contract to pay for property taken without the exercise of the eminent domain power. Petitioners sued first for a mandatory injunction and then amended to ask damages. The State Highway Commission then claimed to have "reserved the right" to limit and control access under the exercise of its police power in a certain condemnation action filed in the District Court of Johnson County, Kansas, on September 30, 1949, wherein the land for I-35 was originally appropriated. Oddly enough, the Kansas Legislature had not given the Commission authority to either establish or acquire limited access facilities until 1953.

A two lane highway was finished about 1951. Subsequently, a super service station and a restaurant facility were constructed on the abutting land and full access

rights were enjoyed for many years. Petitioners leased the restaurant on March 12, 1956, for a period of 10 years in reliance upon direct access. A four lane facility with frontage roads was later constructed and petitioners continued to enjoy full access rights to the northbound lanes of the main highway for several years. They based their claim to access on two points: (1) The Highway Commission had no authority to designate, limit or control access until the controlled access facilities statute was passed in 1953 (Kansas G.S., 1961 Supp., 68-1901, *et seq.*), and (2) That the Highway Commission had granted a permanent access easement to the owner of the fee in 1952, the easement being appurtenant to the property and inuring to the benefit of the lessee. (See Highway Entrance Permit, appendix, *infra*, p. A1.) The trial court ruled in favor of the Commission on point 1 and in favor of the lessees on point 2. An appeal and cross appeal were filed and the Commission ultimately prevailed on both points.

The Highway Entrance Permit is on a standard mimeographed form and was prepared by the Commission in the Commission's office. Paragraph 10 referring to the permanency of the access to the northbound lanes was specially inserted and typed on the form. The evidence at the trial indicated that the purpose of the entrance permit was to clarify an ambiguous situation and to assure the grantee of a permanent right of access to the northbound lanes prior to his expending a great sum of money for improvements. A trial was had in the Johnson County District Court and the jury fixed the damages to the petitioners' leasehold at $51,454.00. The trial court approved the verdict and entered judgment for that amount in favor of the petitioners. The Commission appealed to the Kansas Supreme Court and petitioners cross appealed on the point as to whether any access rights were acquired

in the 1949 condemnation. It made little difference to the petitioners upon which theory they prevailed but they wanted to preserve both barrels.

Upon appeal, the State Supreme Court ruled in favor of its Highway Commission, holding that petitioners were not entitled to compensation as they had no access rights to take. The Kansas Supreme Court simply stated that the entrance permit was ambiguous and, without applying any of the usual rules of construction or considering surrounding circumstances, resolved all doubt about the so-called ambiguity in favor of Kansas. A timely motion for rehearing was filed and summarily denied.

REASONS FOR GRANTING THE WRIT.

The concept of the limited access highway is a relatively new one and has created problems in all jurisdictions. There exists doubt and uncertainty as to what property rights are protected under the United States Constitution. Every time a new super highway is constructed there arise numerous cases on the rights of abutting owners. The uncertainty as to the effect of the Federal Constitution in this area has led to confusion and inconsistencies in the state courts. It would appear to be timely for this Court to decide what rights of access are protected under the Fifth and Fourteenth amendments. In *Martin v. Creasy*, 360 U.S. 219, 3 L. Ed. 2d 1186, 79 S. Ct. 1034, this Court faced an analogous situation to the one at bar. In that case, a Federal District Court had enjoined the state from constructing a limited access highway since there was no provision for compensation for the taking of access rights. This Court held that the action was premature and stated: "If, after all is said and done in the Pennsylvania courts, any of the plaintiffs believe that the

Commonwealth has deprived them of their property without due process of law, this Court will be here." The petitioners have been deprived of their property and the highest court in the State of Kansas did not see fit to provide for their compensation. Thus, they are here.

ARGUMENT.

The basic question involved here is whether access to a highway is a property right compensable under the Fifth and Fourteenth Amendments. Certainly, the overwhelming weight of authority holds that it is.

The United States Supreme Court, in *Donovan v. Pennsylvania Co.*, 1905, 199 U.S. 279, 301-02, 26 S. Ct. 91, 97, 50 L. Ed. 192, discussed the rights of abutting property owners and stated:

> "* * * The right may be regarded in the nature of an incorporeal hereditament. * * * The general doctrine is correctly stated in Dillon on Municipal Corporations: 'For example, an abutting owner's right of access to and from the street, subject only to legitimate public regulation, is as much his property, as his right to the soil within his boundary lines. When he is deprived of such right of access, or of any other easement connected with the use and enjoyment of his property, other than by the exercise of legitimate public regulation, he is deprived of his property.'"

The property right of access is sometimes defined as an "easement access" or an "easement appurtenant." (See *Riddle v. State Highway Commission*, 184 Kan. 603, 610, 339 P.2d 301; 28 C.J.S., Easements, § 1-4, pp. 619-39; 25 Am. Jur., Highways, § 154, p. 338; 30 C.J.S., Highways, § 141, p. 1079; Restatement of the Law, Servitudes, § 450.) There is an excellent review of the various authorities and periodicals in *Cypsu v. Stevens*, 160 F. Supp. 404

So far as this petition is concerned, we base our right to access upon the highway entrance permit which was duly executed and attested by the Director and Secretary of Highways. There is no question but what the Commission and its officers had authority to grant an access permit and this fact is recognized in the Kansas Supreme Court's opinion.

The rule that surrounding facts and circumstances can be shown to ascertain the meaning of an ambiguous instrument is universally accepted. 12 Am. Jur., Contracts, § 247; *Kennedy* v. *Monroe*, 165 Kan. 168, 193 P.2d 220.

The circumstances under which the permit was given are uncontroverted. The grantee requested the same prior to expending money for improvements and would certainly not have built a gas station and truck stop had he anticipated that his nearest direct access to the highway would be one-half mile to the south and one and one-half miles to the north. The restaurant and filling station are not visible at the places one must turn off the main highway in order to patronize them.

The Commission prepared the entrance permit in its own office and specifically typed in paragraph 10. The general rule is that in construing a written instrument, for the purpose of determining intent, interlineations written into a printed form by the scrivener are given greater weight, in case of conflict, than the printed words. *Hickey* v. *Dirks*, 156 Kan. 326; 16 Am. Jur., Deeds, § 178; 12 Am. Jur., Contracts, § 253. See also *Hagan* v. *Scottish Union and Nat. Ins. Co.*, 186 U.S. 423; 46 L. Ed. 1229, 22 Sup. Ct. Rep. 862, where this Court states:

> "It is a well settled rule of law that if there is a repugnancy between the printed and the written provisions of the contract, the writing will prevail. It

> is presumed to express the specific intention of the parties."

The Kansas courts further recognize the rule that a deed should be construed against the grantor in favor of the grantee. *Brewer* v. *Schammerhorn*, 183 Kan. 739, 332 P.2d 526. The theory is that since a deed is the act of the grantor it will be construed most strongly against him. *Rose* v. *Board of Directors of School District*, 162 Kan. 720, 179 P.2d 181; *Kinmouth* v. *Griffith*, 180 Kan. 389; *First National Bank of Lawrence* v. *Methodist Home*, 181 Kan. 100, 309 P.2d 389; *Durand* v. *Higgins*, 67 Kan. 110, 72 Pac. 567.

Doubtful language in a contract is to be construed most strongly against the party preparing it. 12 Am. Jur., Contracts, § 252. Another rule often applied is that where there is an irreconcilable conflict between general provisions of a contract and particular portions written in, preference is given to the latter for purposes of ascertaining the true intention. 12 Am. Jur., Contracts, 244.

The typed-in portion of the permit clearly shows the intent of the parties in an exact literal construction. Indeed, there was absolutely no purpose in inserting the paragraph unless it be construed as a permanent entrance to both northbound lanes of I-35. This is what it says. To "interpret" the instrument in the manner of the Kansas Supreme Court is to completely remove the specially inserted paragraph 10 and to give it no meaning whatsoever. Petitioners are surprised to find in the opinion an implication from their leasing agreement that they recognized the temporary nature of the permit. The proviso is as follows:

> "In event the present entrances are removed and providing the state in building a service road leaves no access to the property the rent will not be charged for the time traffic is cut off."

Petitioners submit that the obvious intent of this clause was to provide for the suspension of rent when actual construction and the presence of machinery would physically prohibit any ingress or egress. We suggest that the interpretation given the provision by the Kansas Court would result in the elimination of all rent. The use of the condition "for the time" certainly indicates a temporary condition. It was the intent of the parties that the "present entrances" would by necessity be removed and redone in order to allow the construction of the service road.

In view of the aforegoing, petitioners submit that the interpretation by the Kansas Court is so onerous as to be completely devoid of any reasonableness. It is in conflict with the prior decisions of Kansas as well as the decisions of this Court. Petitioners contend that the respondent has confiscated a valuable property right and that the requirements of due process ought not to be evaded by subtle encroachments of judicial opinion declaring no property rights to exist where they have heretofore not only existed but been used in the development of a flourishing business.

CONCLUSION.

For the reasons set forth above it is respectfully submitted that this petition for writ of certiorari should be granted.

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Olathe, Kansas.

PETER A. MARTIN,
Patrons Building,
Olathe, Kansas,
Attorneys for Petitioners.

Easement

STATE HIGHWAY COMMISSION OF KANSAS
HIGHWAY ENTRANCE PERMIT

WHEREAS, *L. F. Cox & W. D. Craig, Partners D.B.A. Craigs Economy Service* of *Olathe, Kansas** hereinafter
owner
termed the Petitioner, who is the lessee of property abutting a State Highway known as Route U.S. 50, re-
commercial
quests permission and authority to construct a private entrance to said State Highway, *.05* miles *Northeast* from
direction
Olathe more particularly described as follows: *Stations*
Place or town
455 to 460 Proj. F. I. 50-46 02-3, Located in S½, NE¼
(Plan Stations)
Sec. 30 T13S R24E and

WHEREAS, the State Highway Commission plans future construction on this section of highway, which includes additional roadway lanes separated by a dividing strip, parallel frontage roads and other construction and devices for the protection and convenience of traffic, and

WHEREAS, this future construction may require a change in location of the entrance(s) now desired by the Petitioner and prohibit direct ingress and egress to the main travelled highway, and

WHEREAS, the State Highway Commission has acquired the necessary right-of-way in Johnson County by eminent domain, and its authority to control entrances and access facilities has been confirmed by the Johnson County District Court in Case No. 18188,

---

*Italics indicates typing on printed form

THEREFORE, permission is hereby granted to construct temporary direct entrance (s) to the main travelled portion of said highway in its present stage of construction subject to the following terms and conditions:

1. Petitioner agrees to relinquish his right to direct entrance to the main travelled roadway as herein granted at any future time that the State Highway Commission constructs frontage roads or provides other means of ingress and egress from the main travelled way to the property of the Petitioner.

2. The Petitioner shall furnish all material, do all work and pay all costs of the construction of the temporary direct entrances requested by this permit and shall, in a reasonable length of time, restore said Highway to a condition similar or equal to that existing before commencement of the described work. It is, also, understood that the work shall be completed within *Six Months* after the date this permit is approved, otherwise, the permit becomes null and void.

3. That the proposed work will be located and constructed to the satisfaction of the State Highway Engineer or his duly authorized representative, and as shown on the attached plans which are part of this permit. The material and construction methods used on all of the work within the Right-of-Way limits shall conform to the current Standard Specifications of the State Highway Commission of Kansas.

4. A check, or other suitable bond, in the amount of *fifty* dollars (*$50.00*), made payable to the State Highway Commission of Kansas is hereby deposited with this permit to guarantee and insure satisfactory performance of the conditions of this permit. The Petitioner agrees that in case of failure or refusal to perform the work satisfac-

5

toriiy the State Highway Commission may use all or any part of the deposit to repair or restore said Highway.

When work covered by this permit is completed, notify the Division Engineer, *L. H. Vincent* at *Topeka, Kansas*, for inspection. If the work is satisfactorily completed when inspection is made by the Division Engineer, any unused portion of the deposit will be returned to the Petitioner.

The amount of the above mentioned check shall be determined by the schedule of deposits as follows:

Entrances: A $10 deposit is required for farm or house entrances not to exceed a twenty-four foot roadway.

A $50 deposit is required for entrances having a roadway wider than twenty-four feet or for entrances to filling stations, refreshment stands or any other commercial establishment.

5. In the granting of this permit the Petitioner agrees not to interfere or obstruct traffic on said Highway, unless specifically provided for in this permit.

6. The Petitioner shall not, at any time hereafter, serve any patron while the vehicle of said patron is parked on any portion of the State Right-of-Way.

7. The Petitioner, his successors or assigns, shall assume all risk and liability for accidents and damages that may accrue to persons or property on account of this work.

8. That in the event the State Highway Commission deems it necessary or proper to make any alteration or improvement along or upon the Highway or Right-of-Way the Petitioner agrees to save the State Highway Commis-

sion harmless for any damage to said Petitioner's construction along or upon the said Highway or Right-of-Way and the Petitioner further agrees that upon notice being served upon him, he will, within a reasonable time, alter, change the location or move his construction or work off the Highway or Right-of-Way as requested by Said Commission or its duly authorized representative without expense to the Commission aforesaid.

9. The Petitioner agrees to notify the Division Engineer, State Highway Commission, Topeka, Kansas, before starting work.

10. *It is agreed that upon ultimate completion of the road as a four-lane highway the entrance at approximate plan station 455 + 70 shall remain as a permanent access to the north bound traffic lanes and that no crossover of traffic between the south bound lanes and the north bound lanes will be permitted.*

This permit is hereby accepted and its provisions agreed to this *26th* day of *Nov* 1952.

W. D. Craig
Signed *T. F. Cox*
Petitioner

Witness *Richard Secrest*

Permit granted this day of 19

State Highway Commission of Kansas
By *Gale Moss*
Director

Witness *F E Harvi Jr.*
Secretary, State Highway Commission

Decision of Trial Court.

IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS

HARLEY BLAYLOCK and
MARIAN L. BLAYLOCK,
Plaintiffs.
vs.
STATE HIGHWAY COMMISSION OF THE STATE OF KANSAS,
Defendant.
No. 28125

JOURNAL ENTRY.

And now, on this 19th day of October, 1961, at 9:30 o'clock A.M., this cause comes regularly on for trial. Plaintiffs appear in person and by Peter A. Martin, their attorney, and defendant appears by Jerry W. Hannah and Mark L. Bennett, Jr., its attorneys.

Defendant asks leave of court to amend its answer to deny the authority of the Director of the State Highway Commission or of any other agent of the State to enter into a permit granting permanent access to the main traveled portion of Interstate 35 and to verify the amended answer. The court hears the arguments and statements of counsel, and being fully advised in the premises, finds that the motion should be and is denied.

Thereupon, the parties stipulate and agree that the only issue to be submitted to the jury is the amount of compensation, if any, which should be paid for the taking of access to the main traveled portion of I-35, said com-

pensation being the difference, if any, between the value of the leasehold interest less reserved rents immediately before the taking of access and the value of the same less reserved rents immediately after the taking.

Both parties announce ready and the trial of the cause is proceeded with. A jury of twelve is examined, *empanelled*, and sworn and the opening statements are heard.

Thereupon, plaintiffs begin the introduction of their evidence and the trial of the cause is proceeded with. At the hour of adjournment the jury is duly admonished and the cause continued until the following day.

And now, on this 20th day of October, the court having met pursuant to adjournment, come the parties heretofore present. The trial of the cause is proceeded with and plaintiffs continue the presentation of their evidence and rest. After the evidence of plaintiffs is fully heard, the defendant orally demurs to the same, which demurrer is overruled. The trial of the cause is again proceeded with and the defendant introduces its evidence and rests. Defendant moves for a directed verdict and the court overrules said motion. The trial of the cause is then adjourned until the following day.

And now on this 21st day of October, 1961, come the parties heretofore present. The jury then retires for a view of the premises in the custody of the bailiff and, upon their return, the court reads its written instructions to the jury as to the law in the case. Arguments of counsel are fully heard, and the jury, in charge of their sworn bailiff, retire to the jury room to consider on their verdict.

The jury notify the court that they have agreed upon a verdict and are brought into open court, and the jury, being all present by and through their foreman, return the following verdict, to-wit:

"We, the jury empaneled and sworn in the above entitled case, do, upon our oath, find that the fair market value of the leasehold interest immediately before the taking of the entrance roads on April 7, 1959 $55,445
immediately after the taking on that date $ 3,991

Difference $51,454

/s/ Maurice Wheeler"

The jury is polled and is then discharged from further consideration of the case. The cause is continued pending the submission of certain questions of law heretofore reserved.

And now, on this 20th day of November, 1961, this cause comes regularly on for hearing before the court. Plaintiffs appear by Peter A. Martin, their attorney, and defendant appears by Jerry W. Hannah and Mark L. Bennett, Jr., its attorneys. The defendant again asks leave of court to amend its answer to claim the defense of ultra vires pursuant to its motion filed on November 7, 1961, and the court, over plaintiffs' objection, allows the same and defendant's answer is so amended.

Thereupon, evidence and argument in support of the amendment are presented and the court takes the matter under advisement.

And now, on this 20th day of December, 1961, the above-entitled matter comes on for determination by the Court of the legal questions involved, primarily being whether or not the plaintiffs own such an interest in the entrances or crossovers which were removed on April 7, 1959 as to constitute property which could not be taken except by payment of full compensation therefor.

The Court finds that the right of way for the new Highway I-35 adjacent to the leasehold interest of the plaintiffs was acquired by condemnation in 1949. That in said condemnation action the State Highway Commission did not acquire any existing rights of access as this is a new highway and no rights were in existence at the time; and that in addition to the ground acquired the Highway Commission with or without legislative authority did acquire the right to control and regulate entrances or access facilities to the main traveled portion of such Inter-state Highway. (See Paragraph 5-C of the petition.)

That subsequent thereto the property was transferred by the then owners, Gilberts, to Craig & Cox.

That subsequent thereto and on or about November 26, 1952, the State Highway Commission by Resolution and Entrance Permit, Defendant's Exhibits "F" and "G", granted Cox & Craig a permanent entrance or crossover to the northbound lane of I-35. That thereafter and on the 12th day of March, 1956, the said Craig & Cox entered into a lease for a period of ten years with the plaintiffs whereby the plaintiffs leased the restaurant facilities located on said premises. That at the time of the execution of the lease, both the lessors and the lessee knew of and relied upon the highway permit then in existence. That on April 7, 1959, the Highway Commission removed the entranceways to the northbound lane of traffic and the question of just compensation therefore was presented to the jury, which returned a verdict setting forth the amount of such compensation.

IT IS CONSIDERED, ORDERED, ADJUDGED AND DECREED that the plaintiffs had as of April 7, 1959, a property interest in and to the entrance or access cross-over to the northbound lane of Interstate 35 which property inter-

est could not be taker from them without payment of just and full compensation.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the State Highway Commission had authority to issue the said entrance permit, did so, and is bound thereby.

IT IS THEREFORE BY THE COURT CONSIDERED, ORDERED, ADJUDGED AND DECREED that plaintiffs have and recover judgment of and from defendant in the amount of $51,454.00 with interest thereon at the rate of 6% per annum from April 7, 1959, and costs.

s/ Raymond H. Carr
District Judge, Division No. 3

FILED: February 9, 1962. Betty West, Clerk of the District Court.

APPROVED AS TO FORM:

s/ Peter A. Martin
Patrons Building
Olathe, Kansas
Attorney for Plaintiffs

s/ Jerry W. Hannah
New England Building
Topeka, Kansas
An Attorney for Defendant

Decision of Kansas Supreme Court

No. 43,046

HARLEY BLAYLOCK and MARIAN L. BLAYLOCK,
Appellees and Cross Appellants,

v.

THE STATE HIGHWAY COMMISSION OF THE STATE OF KANSAS,
Appellant and Cross Appellee.

SYLLABUS BY THE COURT

1. Where plaintiffs entered into an ambiguous writing with the defendant State Highway Commission, the document is to be construed without the doctrine of estoppel being applied as against the state, and the writing is held to have been misinterpreted by the trial court.

2. The purported agreement shown not to grant a permanent right of access to the highway.

Appeal from Johnson district court, division No. 3, RAYMOND H. CARR, judge. Opinion filed April 6, 1963. Reversed.

Jerry W. Hannah, of Topeka, argued the cause and *Charles N. Henson*, assistant attorney general, and *Mark L. Bennett, Jr.*, of Topeka, were with him on the briefs for the appellant and cross appellee.

Peter A. Martin, of Olathe, argued the cause and was on the briefs for the appellees and cross appellants.

Alfred B. Page, Ralph F. Glenn, L. M. Cornish, Jr., M. D. Bartlow, Gary Rohrer and *Jan W. Leuenberger*, all of Topeka, were on the briefs as Amicus Curiae.

The opinion of the court was delivered by

JACKSON, J.: This action was begun by Harley Blaylock and his wife Marian who are now denominated as the appellees and cross appellants. We shall hereinafter refer to them as plaintiffs and to the Highway Commission as the defendant. Plaintiffs are the leaseholders of a restaurant or cafe which is located on Interstate Highway No. 35 between Olathe and Kansas City in Johnson county.

Plaintiffs filed their action against the defendant commission in Shawnee county district court and later moved for a change of venue to Johnson county, which the Shawnee county court granted.

Plaintiffs complain that they had at one time a permit of access to the north two lanes of traffic which had been granted to plaintiffs' lessors W. D. Craig and L. F. Cox. Plaintiffs assert that they had the right to use the aforementioned access and had depended upon such right when they entered into the ten-year lease of the restaurant in 1956.

Plaintiffs' petition contained a copy of the access permit which was attached thereto as Exhibit "B". We set out a copy thereof:

"EXHIBIT 'B'

State Highway Commission of Kansas
Highway Entrance Permit

"Whereas, L. F. Cox & W. D. Craig, Partners D.B.A. Craigs Economy Service of Olathe, Kansas hereinafter termed the Petitioner, who is the owner of property abutting a State Highway known as Route U. S. 50, requests permission and authority to construct a commercial entrance to said State Highway, 0.5 miles Northeast from Olathe more particularly described as follows: Stations 455 to 460 Proj. F.I.50-

46 02-3, Located in S1/2, NE1/4 Sec. 30 T 13S R 24E, and

"Whereas, the State Highway Commission plans future construction on this section of highway, which includes additional roadway lanes separated by a dividing strip, parallel frontage roads and other construction and devices for the protection and convenience of traffic, and

"Whereas, this future construction may require a change in location of the entrance(s) now desired by the Petitioner and prohibit direct ingress and egress to the main travelled highway, and

"Whereas, the State Highway Commission has acquired the necessary right-of-way in Johnson county by eminent domain and its authority to control entrance and access facilities has been confirmed by the Johnson County District Court in Case No. 18188,

"Therefore, permission is hereby granted to construct temporary direct entrance(s) to the main travelled portion of said highway in its present stage of construction subject to the following terms and conditions:

"1. Petitioner agrees to relinquish his right to direct entrance to the main travelled roadway as herein granted at any future time that the State Highway Commission constructs frontage roads or provides other means of ingress and egress from the main travelled way to the property of the Petitioner.

"2. The Petitioner shall furnish all material, do all work and pay all costs of the construction of the temporary direct entrances requested by this permit and shall, in a reasonable length of time, restore said Highway to a condition similar or equal to that existing before commencement of the described work. It is also understood that the work shall be completed within six months after the date this permit is approved, otherwise the permit becomes null and void.

"3. That the proposed work will be located and constructed to the satisfaction of the State Highway Engineer or his duly authorized representative, and as shown on the attached plans which are part of this permit. The material and construction methods used on all of the work within the Right-of-Way limits shall conform to the current Standard Specifications of the State Highway Commission of Kansas.

"4. A check, or other suitable bond, in the amount of fifty dollars ($50.00) made payable to the State Highway Commission of Kansas is hereby deposited with this permit to guarantee and insure satisfactory performance of the conditions of this permit. The Petitioner agrees that in case of failure or refusal to perform the work satisfactorily the State Highway Commission may use all or any part of the deposit to repair or restore said Highway.

"When work covered by this permit is completed, notify the Division Engineer, L. H. Vincent at Topeka, Kansas, for inspection. If the work is satisfactorily completed when inspection is made by the Division Engineer, any unused portion of the deposit will be returned to the Petitioner.

"The amount of the above mentioned check shall be determined by the schedule of deposits as follows:

"Entrances: A $10 deposit is required for farm or house entrances not to exceed a twenty-four foot roadway.

A $50 deposit is required for entrances having a roadway wider than twenty-four feet or for entrances to filling stations, refreshment stands or any other commercial establishment.

"5. In the granting of this permit the Petitioner agrees not to interfere or obstruct traffic on said Highway unless specifically provided for in this permit.

"6. The Petitioner shall not, at any time hereafter, serve any patron while the vehicle of said patron is parked on any portion of the State Right-of-Way.

"7. The Petitioner, his successors or assigns, shall assume all risk and liability for accidents and damages that may accrue to persons or property on account of this work.

"8. That in the event the State Highway Commission deems it necessary or proper to make any alteration or improvement along or upon the Highway or Right-of-Way the Petitioner agrees to save the State Highway Commission harmless for any damage to said Petitioner's construction along or upon the said Highway or Right-of-Way and the Petitioner further agrees that upon notice being served upon him, he will, within a reasonable time, alter, change the location or move his construction or work off the Highway or Right-of-Way as requested by said Commission or its duly authorized representative without expense to the Commission aforesaid.

"9. The Petitioner agrees to notify the Division Engineer, State Highway Commission, Topeka, Kansas, before starting work.

"10. It is agreed that upon ultimate completion of the road as a four lane highway; the entrance at approximate plan station 456-70 shall remain as a permanent access to the north bound traffic lanes and that no crossover of traffic between the south bound lanes and the north bound lanes will be permitted.

"This permit is hereby accepted and its provisions agreed to this 26th day of Nov., 1952.

Signed W. D. Craig.
L. F. Cox
Petitioner

Witness Richard Secrest

Permit granted this ____ day of ____, 19__.
State Highway Commission of Kansas
By Gale Moss,
Director.

Witness F. E. Harwi, Jr.
Secretary, State Highway Commission."

It is said that paragraph 10 was specially inserted in the paper.

It is alleged in the petition that plaintiffs' rent amounts to 3% of the gross sales or a minimum of $300 per month.

Plaintiffs contend that the above access permit was to constitute a permanent right of access to the north bound lanes of Interstate Highway No. 35. They, of course, stress the provisions of paragraph 10 in which we find the words: "shall remain as a permanent access to the north bound traffic lanes. . . ."

The pertinent part of the decision made by the trial court was as to the binding effect of the access permit. The court held that this was a binding permanent permit and that plaintiffs had the right to rely on it and had the right to be compensated for its loss. The court approved the jury's verdict of $51,545 as being the proper amount due the plaintiffs.

It has now become the duty of this court to construe and decide the binding effect of the access permit noted above. There is no question that paragraph No. 10, as it appears in the permit, is speaking in a different tone than in the other parts of the document. In paragraph No. 1, the petitioner agrees to relinquish his right to direct access to the main traveled roadway as herein granted at any future time that the Commission constructs frontage roads or provides other means of ingress or egress from the main traveled way to the property of the petitioner.

In paragraph No. 2, the access to the main road is spoken of as temporary and only in paragraph No. 10 is there any indication that plaintiffs are being granted any permanent right of access. So defendant argues strongly that the permit is ambiguous and that it does not grant a permanent property right.

Moreover, it is argued that if the contract be interpreted as an exclusive franchise conveying a property right then its ambiguity requires judicial construction in favor of the public, citing C.J.S. Franchises §26, p. 182 and certain other authorities.

It is also argued that the state can not be estopped. We are cited to the case of *State, ex rel., v. Paul and Grice*, 113 Kan. 412, 214 Pac. 425, in which Mr. Justice Dawson said:

> "Counsel for appellants call our attention to a respectable line of decisions which hold that the state itself may be estopped to assert its rights in a public highway through nonuse, silence, apparent acquiescence, length of time, adverse possession, abandonment, long use at variance with the originally established road limits, and the like. This court has never given its sanction to any such doctrine. It is altogether out of accord with the theory of Kansas jurisprudence. Beginning with *Wood v. M.K. & T. Railway Co.*, 11 Kan. 329, 349, there is a long undeviating line of decisions down to and including *In re Moseley's Estate*, 100 Kan. 495, 164 Pac. 1073, and *The State, ex rel., v. Piper*, 103 Kan. 794, 798, 176 Pac. 628, which holds that laches and estoppel do not operate against the state, that no procrastination of public officials prejudices the state and that their tardiness neither bars nor defeats the state from vindicating its sovereign rights, except where positive statutes so provide. That the state's rights in a public highway differ in no material respect from any other of its manifold sov-

ereign interests and concerns is also settled law. (See *Eble* v. *The State*, 77 Kan. 179, 184, 93 Pac. 803.)"

Attention is also directed to *State, ex rel.*, v. *Wheat Farming Co.*, 137 Kan. 697, 22 P.2d 1093, at page 715 where the question of estoppel against the state was again referred to and the statement in the Paul and Grice case again quoted and applied.

Thus, the court is of the opinion that the permit did not clearly give plaintiffs a permanent access to the northbound lanes; but was intended to give only a temporary right of access until the defendant Commission constructed frontage roads or provided other means of ingress and egress from the main traveled way to the property of the plaintiffs. This construction of the permit is fortified by the leasing agreement between the lessors and the plaintiffs (lessees) wherein they recognized the temporary nature of the permit by the following language:

> "In event the present entrances are removed, and providing the state in building the service road leaves no access to the property, the rent will not be charged for the time traffic is cut off."

By their petition the plaintiffs herein claim damages for the taking of property rights, which it is alleged *they acquired under the permit*. These rights, they claim, must be taken by condemnation.

No appeal was taken either by the landowners, the lessors were not parties to this action, or the State Highway Commission in the original condemnation proceedings. In that proceeding the Commission acquired rights of access to the highway here in question. Thus, the instant case presents no question concerning the power of the Commission to control access to the property in question as

against the landowners from whom such rights were taken, and the plaintiffs as lessees acquired no greater rights by an assignment than the lessors had.

On the facts presented it must be conceded the defendant Commission had authority to grant an access permit in its exercise of the police power of the state. The parties do not challenge this point.

It follows that the right of access acquired by the plaintiffs by an assignment of the lessors' rights under the permit was only a temporary right of access.

After the defendant Commission had completed the frontage road to the plaintiffs' restaurant, it had the right under the permit to remove the temporary entrances granted by the permit, and the plaintiffs were not entitled to recover damages against the Commission for their removal.

The judgment of the lower court is reversed. Robb, J., dissents.

Office-Supreme Court, U.S.
FILED
OCT 21 1963
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No. 378

HARLEY BLAYLOCK and MARION L. BLAYLOCK,
Petitioners,

vs.

THE STATE HIGHWAY COMMISSION OF THE STATE OF KANSAS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF FOR THE STATE HIGHWAY COMMISSION OF KANSAS IN OPPOSITION

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INDEX

Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement	2
Reasons Why Certiorari Should Be Denied	5
Conclusion	10
Appendix	A1

Citations

CASES:	
Beck v. *Washington*, 369 U.S. 541 (1962)	8
City of Hutchinson v. *White*, 117 Kan. 622, 625, 23 Pac. 508	10
Donoran v. *Pennsylvania Company*, 199 U.S. 279 (1905)	6
Ellis v. *Dixon*, 349 U.S. 458 (1955)	8
Erie R. Company v. *Tompkins*, 304 U.S. 64 (1938)	5, 7, 9
Herrmann v. *Rogers*, 358 U.S. 332 (1959)	5
Hines, Trustee, v. *Martin*, 268 U.S. 458 (1925)	5
Martin v. *Creasy*, 360 U.S. 219 (1959)	6
Messenger v. *Anderson*, 225 U.S. 436 (1912)	7
Moore v. *State Highway Commission*, 191 Kan. 624, 383 P.2d 549	7
Riddle v. *State Highway Commission*, 184 Kan. 603, 339 P.2d 301	6
Six Companies v. *Joint Highway District Number Thirteen*, 311 U.S. 180 (1940)	9
State ex rel. v. *Paul and Grice*, 113 Kan. 412, 214 Pac. 425	10
Stembridge v. *Georgia*, 343 U.S. 541 (1952)	8
United States v. *Howard*, 352 U.S. 212 (1957)	8
Williams v. *Conger*, 125 U.S. 397 (1888)	7
STATUTES AND AUTHORITIES:	
28 U.S.C. 1257	2
12 Am. Jur., "Contracts", Sec. 254	10

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BRIEF FOR THE STATE HIGHWAY COMMISSION OF KANSAS IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of the State of Kansas (Pet. App. A10-A18) is reported at 191 Kan. 187, 380 P.2d 337. The trial court's opinion (Pet. App. A5) is not reported.

JURISDICTION

The judgment of the Supreme Court of Kansas was entered April 6, 1963. A petition for rehearing was denied on May 10, 1963, and the Petition for Certiorari was filed on August 15, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

QUESTIONS PRESENTED

1. Whether a federal question is present when the highest court of a state decides the state's restriction of abutters to indirect access (frontage roads) on a newly constructed limited access highway constitutes no taking of a compensable property right.

2. Is a claimed violation by a state of the "just compensation" provision of the 5th and 14th Amendments properly before this Court, when the highest court of a state did not consider or rule on that question because the argument was not properly presented to that court in relation to the constitutional guarantee?

3. Whether a federal question of due process is presented by the construction of an ambiguous contract in the Supreme Court of Kansas, when the record fails to establish the argument was raised in that court.

STATEMENT

In October, 1959, the petitioners, lessees of a truck stop restaurant near Olathe, Kansas, abutting Interstate Highway 35, brought suit against The State Highway Commission of Kansas for a mandatory injunction requiring

it to provide direct access from petitioners' leased property to the main traveled northbound lane of the Interstate Highway, or, in the alternative, that The State Highway Commission be required to compensate plaintiffs in damages. The case was tried in the District Court of Johnson County, Kansas, and petitioners obtained a substantial jury verdict. On appeal, the judgment of the trial court was reversed. A motion for rehearing was denied, and this Petition for Certiorari was filed.

The trial court made findings that abutters have no pre-existing right of access to a restricted access highway constructed on a new location. (Pet. App. A8)

> "The Court finds that the right of way for the new Highway I-35 adjacent to the leasehold interest of the plaintiffs was acquired by condemnation in 1949. That in said condemnation action the State Highway Commission did not acquire any existing rights of access as this is a new highway and no rights were in existence at the time; and that in addition to the ground acquired the Highway Commission with or without legislative authority did acquire the right to control and regulate entrances or access facilities to the main traveled portion of such Inter-State Highway. (See Paragraph 5C of the petition.)"

In acquiring the right of way for the construction of this highway on a new location, the affected abutting landowners were clearly apprised of the character of the new highway. (Respondent's App. Page A1).

Prior to the original condemnation of the right of way acquired in accordance with the above conditions, the respondent designated the highway on a new location as part of the state highway system to be constructed under joint agreement between the Federal Bureau of Public Roads and The State Highway Commission of the State

of Kansas. The Commission began construction of the controlled access highway in segments on the right of way acquired. In 1952, a two-lane ribbon connecting Olathe and Kansas City, Kansas, was completed, and by April 7, 1958, the second two-lane ribbon and a frontage or service road were completed and opened on the same right of way. During the period of construction, and in 1952, a Highway Entrance Permit (Pet. App. A1), was issued to petitioners' lessor. Direct driveways were installed to the single ribbon which had been completed at that time. This ribbon is now the northbound lane of Interstate Highway 35.

In March, 1956, petitioners obtained a ten year lease on the property in question, and it is this lease upon which they based their claim to damages.

After completion of the entire highway, including the frontage roads, on April 7, 1959, The State Highway Commission changed petitioners' means of access by removing the driveways between the frontage road and the main-travelled lanes of the highway, which left the petitioners access to the frontage road, leading to the main-traveled lanes of the highway by an indirect route.

The trial court, holding that the petitioners had no property right of direct access following the original condemnation, also held they did obtain a property right of access by virtue of the Highway Entrance Permit, and permitted the case to go to the jury on the question of damages to the leasehold estate by virtue of their subsequent restriction to a frontage road. Petitioners received a verdict for damages.

The Supreme Court of Kansas, in its opinion (Pet. App. A10-A18) held that the Highway Entrance Permit (Pet. App. A1) was an ambiguous document which conveyed no property right to petitioners. By its silence,

the appellate court impliedly affirmed the trial court on the petitioners' cross-appeal from the trial court's ruling that the petitioners had no property right of direct access following the original condemnation and highway construction.

In reversing the trial court on respondent's appeal, the Supreme Court of Kansas emphasized the rule of law that an ambiguous document requires judicial construction in favor of the public. (Pet. App. A16) The Court's opinion also points out that the landowners, through which petitioners gained their rights, took no appeal in the original condemnation action wherein they were given notice that control of abutters' access was established. (Pet. App. A17-A18)

REASONS WHY CERTIORARI SHOULD BE DENIED

1. The central question is whether any substantial federal question is presented when the highest Court of a state determines that no compensable property right has been abridged by the restricting of direct access to an Interstate Highway constructed on a new location. Federal courts, since *Erie R. Company* v. *Tompkins*, 304 U.S. 64 (1938), in determining ultimate federal questions, find a duty to follow state court decisions of substantive character, upon questions which are preliminary, incidental, or collateral to the ultimate federal question. *Herrmann* v. *Rogers*, 358 U.S. 332 (1959). Even before the *Erie* case, this Court stated that the meaning of state statutes and rules of unwritten law of a state affecting within the state are peculiarly of local law, determination of which by state courts will ordinarily be followed by federal courts. *Hines, Trustee*, v. *Martin*, 268 U.S. 458 (1925)

Petitioners, in citing *Donovan v. Pennsylvania Company*, 199 U.S. 279 (1905) (Pet. Brief—7), developed the substantive law of Illinois on the question of access rights in 1905. Respondent doubts the probative effect of this authority on the substantive law of Kansas today.

Petitioners rely on *Martin v. Creasy*, 360 U.S. 219 (1959), to obtain their writ here. There, the Federal District Court for the Western District of Pennsylvania enjoined the construction of a limited access highway where there was no provision for compensation of access rights. This action was reversed by this Court, for the reason that an injunction was premature. The dicta of this opinion quoted in Petitioners' Brief (pp. 6-7) merely serves notice that a landowner might appeal if, after conclusion of his condemnation case, it is found that he has been deprived, without due process of law, of property rights as established in accordance with the law of Pennsylvania.

The substantive law of Kansas is firmly established to the effect that an abutting landowner to a newly constructed limited access highway has no pre-existing property right of access (to that highway) and therefore such right need not be acquired by the respondent. The distinction between acquiring the pre-existing access to an existing highway and the initial restriction of access to a new highway built where no highway previously existed is set out in *Radke v. State Highway Commission*, 184 Kan. 605, 339 P.2d 301, at page 312:

> "While G.S. 1957 Supp. 68-1903, authorizes the commission to acquire private or public property or property rights, including rights of access, by condemnation, in the same manner as now or hereafter authorized by law for acquiring property or property rights in connection with highways, we think the legislature only intended that power to be invoked

to acquire previously existing rights of access when an existing conventional highway is widened and improved as a controlled access facility (G.S., 1957 Supp., 68-1904). In that situation there is a taking of an existing right under the power of eminent domain for which the owner must be compensated (*Simmons* v. *State Highway Commission*, *supra*). *Where, however a new highway is established by the commission as a controlled access facility through land where no highway previously existed, and the right of access is restricted by exercise of the police power, the abutting owner is not entitled to compensation for the restriction of that right.* Generally speaking, damage resulting to property through the exercise of the police power is not compensable (*Mugler* v. *Kansas*, *supra*)." (Our emphasis)

In *Moore* v. *State Highway Commission*, 191 Kan. 624, 383 P.2d 540, the Court approved the rule of the *Riddle* case. At page 628, the Court states as follows:

"It seems well settled that where a new highway is established by the commission as a controlled-access facility through land where no highway previously existed, and the right of access is restricted by exercise of the police power, the abutting landowner is not entitled to compensation for the restriction of that right nor is he entitled to enjoin the commission from restricting his access thereto."

It is well established that where decisions of the highest court of a state are not uncertain, confusing or in conflict, the federal courts are bound by the law of the state as promulgated by the highest court of the state. *Williams* v. *Conger*, 125 U.S. 397 (1888); *Messenger* v. *Anderson*, 225 U.S. 436 (1912); *Erie R. Company* v. *Tompkins*, *supra*.

2. Petitioners' brief filed in the Supreme Court of Kansas did not raise the constitutional question concerning

the taking of property without the payment of just compensation. Accordingly, the opinion of the Supreme Court of Kansas (Pet. App. A10-A18) did not consider or rule upon that question because argument was not properly presented to that Court in relation to that constitutional issue. It is basic that the failure to raise a constitutional issue in the trial court, the State Supreme Court, or on motion for rehearing in the latter court constitutes a waiver. It was through this same process that the defendant waived his "equal protection" contention in *Beck* v. *Washington*, 369 U.S. 541 (1962); there this Court stated at page 553:

> "Assuming arguendo that for the purposes of our jurisdiction the question would have been timely if raised in a petition for rehearing, not having been raised there or elsewhere or actually decided by the Washington Supreme Court, the argument cannot be entertained here under an unbroken line of precedent. (citations)"

The Kansas Court's opinion did not discuss the cross-appeal, but confined itself to the construction of the entrance permit. This Court has stated it will not decide issues which form no part of the opinion below. *United States* v. *Howard*, 352 U.S. 212 (1957).

The Kansas Court's opinion rests on a non-federal ground; *i. e.*, the construction of the ambiguous entrance permit. It is now established that this Court is without jurisdiction to review a judgment of a state court when the existence of an adequate state ground is debatable. *Stembridge* v. *Georgia*, 343 U.S. 541 (1952); *Ellis* v. *Dixon*, 349 U.S. 458 (1955).

When petitioners failed to raise the constitutional issue in their specifications of error (App. *infra* A3), and in

their brief in the Kansas Supreme Court, they abandoned the same for the purposes of their cross-appeal.

3. The Kansas Court held the Highway Entrance Permit (Pet. App. A1) given to petitioners' lessor in 1952 by the respondent to be an ambiguous document. It is clear that the early provisions of the document are in conflict with paragraph 10. Petitioners contend the Kansas Supreme Court denied them due process by its construction of the ambiguous document, arguing that it was done in a manner contrary to prior settled law of the jurisdiction. The *Erie Railroad* case (*supra*) settles the question of power, and denies the federal court the right to decline to follow the state's decisions upon interpretations of contract. It is well established that the federal court, in passing on the validity or construction of contracts, is bound by the substantive law of the state. *Six Companies v. Joint Highway District Number Thirteen*, 311 U.S. 180 (1940).

Respondent invites particular attention to one paragraph of the opinion below at page 191 (See Pet. App. A17):

> "Thus the court is of the opinion that the permit did not clearly give plaintiffs a permanent access to the northbound lane, but was intended to give only a temporary right of access until the defendant Commission constructed frontage roads or provided other means of ingress and egress from the main traveled way to the property of the plaintiffs. This construction of the permit is fortified by the leasing agreement between the lessors and the plaintiffs (lessees) wherein they recognized the temporary nature of the permit by the following language:
>
> "In event the present entrances are removed and providing the state in building the service road

leaves no access to the property, the rent will not be charged for the time traffic is cut off.' "

In addition, the Court made certain observation of authorities on the following propositions:

(a) That an ambiguous instrument purporting to convey a property right requires judicial construction in favor of the public. Petitioners contend this rule to be completely contrary to the law of all jurisdictions, but Respondent finds otherwise. See 12 Am. Jur., *Contracts*, Sec. 254:

> "AGREEMENT AFFECTING PUBLIC.—Where the state is concerned, as in other cases, language is to be given, if possible, its usual and ordinary meaning. However, where the words employed are fairly susceptible of more than one interpretation, agreements affecting the public and agreements with the public are interpreted in favor of the public."

(b) The law of Kansas precludes the state from being bound on contract, absent consideration, on the theory of estoppel. *State ex rel.* v. *Paul and Grice*, 143 Kan. 412, 214 Pac. 425; *City of Hutchinson* v. *White*, 117 Kan. 622, 625, 23 Pac. 508.

It is submitted that the Court's construction of the patently ambiguous entrance permit-contract is in accordance with settled general legal principles and did not deny petitioners due process, as contended.

CONCLUSION

Since settled Kansas substantive law provides no property right of access for abutters on a newly constructed highway, there was no taking of a property right in this case by the construction of the controlled access

highway. It is clear the state court had no opportunity to and did not pass on the constitutional issues raised here. The construction of an ambiguous document by the highest court of a state is controlling in this Court. Since the decision below is correct and is not in conflict with any decision of this Court the Petition for Certiorari should be denied.

Respectfully submitted,

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APPENDIX

(First Published in The Olathe Mirror, Thursday, October 6, 1949.)

Publication Notice

(Abstracted from Appellant's Supplement to Appellees' Counter Abstract—5.)

IN THE MATTER OF CONDEMNATION OF LAND IN JOHNSON COUNTY, KANSAS. No. 18188.

To: . . . Bert Gilbert and Angebelle Gilbert . . . et al.

You and each of you are hereby notified that the State Highway Commission of Kansas has instituted condemnation proceedings against certain lands owned by you in Section 1, 2, 3, 4, 6, 9, 13, 16, 17, 19, 20, 23, 24, 25, 26, 30, 31, 34, 35, and 36, Townships 12 South and 14 South, Range 23 East and 24 East, in Johnson County, Kansas, on Highway 50.

You are further notified that lands condemned herein are for the purpose of constructing an interstate highway, and that such highway will be a controlled access highway as set forth in the petition. (Our emphasis)

The Court has appointed Harry A. Wilson, Paul Stolbert and Tom Poor, three disinterested householders of this county to meet and view the lands taken for the purpose of apraising the land to be taken. Said appraisers will meet at 10 o'clock A. M. on the 9th day of November, 1949, at the office of the Clerk of the District Court at

Olathe, Kansas, to make their appraisement and assess damages, if any.

HARRY A. WILSON,
PAUL N. STOLBERT,
TOM POOR,
Appraisers.

Extract from Original Petition in Condemnation

(Taken from Appellees' Counter Abstract—43.)

5. Petitioner alleges that the Right of Way for Public Highways herein petitioned for has been designated by Federal Authority and by the Kansas State Highway Commission as a part of a National System of Interstate Highways; that in order for such highway to serve the purpose for which it is being constructed it will be necessary for the State Highway Commission to exercise certain traffic controls in order to facilitate the movement of traffic upon said Interstate Highway, and in the exercise of its police power to reduce the hazards of life and property in the interests of public safety as follows:

(a) That all existing entrances or access facilities to the traveled portion of any existing road or highway shall continue to be so used but the petitioner herein reserves unto itself the right to construct in the future an outer highway or service road within the Highway Right of Way to connect with the traveled portion of such interstate highway, and when so constructed, Petitioner reserves the right to require all abutting owners to use such outer highway or service road as means of reaching the main traveled portion of said Interstate Highway and at points to be designated by the State Highway Commission.

(b) That entrances or access facilities to be approved by the State Highway Commission will be provided the

present abutting owners to the traveled portion of highways which are being laid out for the first time, and where no highway has heretofore existed, and in the event in the future an outer highway or service road is constructed within the right of way all abutting owners will be required to use such outer highway or service road as a means of reaching the main traveled portion of said Interstate Highway and only at points to be designated by the State Highway Commission.

(c) That no additional entrances or access facilities from the property of abutting property owners to the main traveled portion of such Interstate Highway may be constructed without written permission of the State Highway Commission having first been obtained and the State Highway Commission, petitioner herein, in the exercise of its police power to control and regulate traffic, reserves the right and authority, to limit and to control the number of such access facilities and the location of the same along said Interstate Highway.

Appellees' Specifications of Error

(Taken from Appellees' Counter Abstract—48.)

1. The trial court erred in its order of November 21, 1961, allowing defendant to amend its answer to claim the defense of ultra vires.

2. The trial court erred in holding that defendant acquired the right to control and regulate entrances or access facilities to the main traveled portion of I-35 in the original eminent domain action filed in 1949.